SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2010-CA-02084

LAURA KARPINSKY, Plaintiff/Appellant

-vs-

AMERICAN NATIONAL INSURANCE COMPANY and ORACLEAN, INC., Defendants/Appellees

BRIEF OF APPELLEE AMERICAN NATIONAL INSURANCE COMPANY

Appeal from the Circuit County of Harrison County, Mississippi
Second Judicial District
Case Number A2402-08-139

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to Rule 28 (a) (1) of the Mississippi Rules of Appellate Procedure, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

	Person or other Entities	**Connection and Interest**
1.	American National Insurance Company d/b/a Edgewater Mall, Biloxi, MS	Appellee
2.	Scott D. Smith, Attorney at Law, PLLC Scott D. Smith, Esq.	Attorney of Record for Appellee American National Insurance Company
3.	Laura Karpkinsky	Appellant
5.	William C. Miller, Esq.	Attorney of Record for Appellant
6.	OraClean, Inc.	Appellee
7.	Mark Norton, Esq.	Attorney of Record for Appellee OraClean, Inc.

RESPECTFULLY SUBMITTED THIS, the 17th day of June, 2011.

AMERICAN NATIONAL INSURANCE COMPANY
Defendant/Appellee

BY: _____
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

I. **FEDERAL**

II. **MISSISSIPPI**

A. SUPREME COURT

B. COURT OF APPEALS

III. MISSISSIPPI RULES OF CIVIL PROCEDURE

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

LAURA KARPINSKY — APPELLANTS

VERSUS — NO: 2010-CA-02084

AMERICAN NATIONAL INSURANCE COMPANY AND ORACLEAN, INC. — APPELLEES

STATEMENT OF THE ISSUES

I. Whether the trial court was correct in granting American National Insurance Company's Motion for Summary Judgment finding that the Plaintiff had failed to present evidence of a genuine issue of material fact and had failed to meet her *prima facie* burden of proof to present a claim of negligence against American National Insurance Company.

STATEMENT OF THE CASE

American National Insurance Company (hereinafter 'ANICO") owns Edgewater Mall in Biloxi, Mississippi. On August 24, 2005, Laura Karpinsky slipped and fell in the concourse area just outside the Lane Bryant store in Edgewater Mall. On August 13, 2008, Ms. Karpinsky filed her Complaint alleging that ANICO and OraClean, Inc. were on actual notice of the water on the floor and thus were negligent in failing "to take reasonable steps to ensure the Plaintiff's safety by ensuring the floor was dry, or by adequately warning Plaintiff of the water on the floor . . . " (R.9). Discovery was conducted by both parties and on May 10, 2010, ANICO filed its Motion for Summary Judgment and Itemization of Facts in Support of Motion for Summary Judgment arguing that Plaintiff Karpinsky could not meet her burden of proof to show any negligence by ANICO that could have caused her to slip and fall. (R.42).[1] The Record does not contain a written response from Ms. Karpinsky to ANICO's Motion for Summary Judgment.

On August 19, 2010, the trial court conducted a hearing on ANICO's Motion for Summary Judgment. The trial court entered its Order granting ANICO's Motion for Summary Judgment on November 2, 2010, ruling that Ms. Karpinsky had failed to present any proof that her fall was caused by a negligent act of ANICO or that ANICO had actual or constructive knowledge of a dangerous condition. (R.100). The trial court entered on Amended Order on December 1, 2010, to include Co-Defendant Oraclean in the grant of Summary Judgment. (R.103). The Plaintiff did not file any post-judgment motions but filed her Notice of Appeal on December 16, 2010. (R.106).

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[1] Co-Defendant Oraclean, Inc. joined in ANICO's Motion for Summary Judgment.

SUMMARY OF THE ARGUMENT

The mere fact that Laura Karpinsky fell and was injured is not, in and of itself, evidence of negligence on the part of ANICO. In Mississippi, merely proving the occurrence of an accident on business premises is insufficient to prove liability; rather, Ms. Karpinsky must demonstrate that ANICO was negligent in the maintenance of the Mall premises. A plaintiff can establish that a business operator was negligent by showing that the business operator caused the dangerous condition. Where the plaintiff proves that an unsafe condition was a result of the conduct of the defendant, then the plaintiff is not obliged to additionally prove that the defendant had actual or constructive knowledge of that unsafe condition. Where the plaintiff is unable to show that the condition was caused by the defendant's acts or is able to show that the dangerous condition was caused by a third person not connected with the business, then, in order to prevail, the plaintiff must allege and prove by competent evidence the defendant's actual or constructive knowledge of the condition. Constructive knowledge is established by proof that the condition existed for such a length of time that, in the exercise of reasonable care, the proprietor should have known of it. A plaintiff must present specific proof as to the relevant actual length of time

To establish negligence in this case, Ms. Karpinsky bore the burden of proving 1) that some negligent act of ANICO caused a dangerous condition in the area where she fell, or 2) if a dangerous condition was caused by a third person unconnected with the premises operation, that ANICO had (a) actual knowledge of the dangerous condition and failed to warn Ms. Karpinsky or (b) had constructive knowledge of the dangerous condition. Unsupported speculation and allegations are not sufficient to

defeat a motion for summary judgment. A plaintiff must show that the party charged is the party actually responsible for the wrong, with reasonable certainty or definiteness. It is not enough that this shall be left to conjecture or to inferences so indefinite that it cannot be determined where conjecture ceases and cogent inferences begin. Ms. Karpinsky has failed to show that the liquid referenced in her Complaint was put there by ANICO employees or caused to be put there through some negligent act of ANICO. Ms.Karpinsky offered no testimony nor did she produce any evidence that would show how long the liquid was on the concourse floor or that ANICO was aware of the presence of the liquid. Eye-witness Gail Clark testified that the liquid had been on the floor less than five (5) minutes and there has been no evidence presented to show or indicate just how long the liquid had been on the floor. Based on Ms. Karpinsky's own testimony and that of Mrs. Clark, Plaintiff Karpinsky cannot show how the liquid came to be on the concourse floor. It is clear from Mrs. Clark's testimony that the liquid had been on the floor for less than five minutes at the time the Plaintiff slipped and fell. Consequently, the Plaintiff cannot meet her burden of proof and ANICO is entitled to judgment as a matter of law.

The Plaintiff has produced no competent summary judgment evidence to support a claim of negligence in the maintenance of the Mall premises so as to defeat ANICO's Motion for Summary Judgment. With this case having been filed in 2008, discovery having been exchanged between the parties, the Motion for Summary Judgment having been filed on May 10, 2010, and the hearing on that Motion held on August 19, 2010, there was ample time available for any additional discovery the Plaintiff wanted to complete in order to obtain evidence sufficient to respond to the Motion for Summary

Judgment and show a genuine issue of material fact. However, the Plaintiff produced no such evidence.

ARGUMENT

A. Summary Judgment Standard

As a general matter of Mississippi law, summary judgment should be granted when the moving party successfully demonstrates to the Court that no genuine issue of material fact exists from the record and the movant is entitled to judgment as a matter of law. *Young v. Wendy's International, Inc.*, 840 So. 2d 782, 783 (Miss.App. 2003). Rule 56(c) of the Mississippi Rules of Civil Procedure states in relevant part that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Adams v. Cinemark USA, Inc.*, 831 So.2d 1156, 1162 (Miss. 2002).

When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere allegations or denials of his pleadings; his response must set forth specific facts showing genuine issue for trial. *Corey v. Skelton,* 834 So.2d 681, 684 (Miss. 2003). The non-moving party may not defeat the motion merely by making general allegations or unsupported speculations or denials of material fact. *Adams,* 831 So.2d at 1161; *See also, Smith v. Noble Drilling Inc.*, 784 So.2d 1003, 1004 (Miss.App. 2001)("The non-movant may not defeat the motion merely by responding with general allegations, but must set forth in an affidavit or otherwise, specific facts showing that issues exist which necessitate a trial.").

The non-moving party's claim must be supported by more than a mere scintilla of colorable evidence; it must be evidence upon which a fair-minded jury could return a favorable verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So.2d 1205, 1214 (Miss. 1996). A party opposing a summary judgment must be diligent and may not rest upon allegations or denials in the pleadings but must by allegations or denials set forth specific facts showing that there are indeed genuine issue for trial . *Moore v. Memorial Hospital at Gulfport*, 825 So.2d 658, 663 (Miss. 2002) *citing Richmond v. Benchmark Construction Corp.* 692 So.2d 60, 61 (Miss. 1997). In other words, "when a Motion for Summary Judgment is filed, the nonmoving party must rebut by producing significant probative evidence showing that there are genuine issues for trial." *Moore,* 825 So.2d at 863 *citing Foster v. Noel,* 715 So.2d 174, 180 (Miss. 1998). Summary judgment is mandated where the respondent has failed "to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Wilbourn*, 687 So.2d 1214 *citing Galloway v. Travelers Insurance Co.*, 515 So. 2d 678, 683 (Miss. 1987) *quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). When a party opposing summary judgment on a claim or defense as to which that party will bear the burden of proof at trial, fails to make a showing sufficient to establish an essential element of the claim or defense, then all other facts are immaterial, and the moving party is entitled to judgment as a matter of law. *Id. citing Galloway*, 515 So. 2d at 684.

To avoid summary judgment, the non-moving party must establish a genuine issue of material fact within the means allowable under the Rule. *Richmond v.*

Benchmark Constr. Corp., 692 So. 2d 60, 61 (Miss. 1997)(citations omitted). Of importance here is the language of the rule authorizing summary judgment "where there is no genuine issue of *material* fact." The presence of fact issues in the record does not per se entitle a party to avoid summary judgment. *Vaughn v. Estate of Worrell*, 828 So.2d 780, 783 (Miss. 2002). The court must be convinced that the "factual issue is a material one, one that matters in an outcome determinative sense . . . the existence of a hundred contested issues of fact will not thwart summary judgment where there is no genuine dispute regarding the material issues of fact." *Hudson* v. Courtesy Motors, Inc., 794 So. 2d 999, 1002 (Miss. 2001) *quoting Simmons v. Thompson Mach. of Miss., Inc.*, 631 So. 2d 798, 801 (Miss. 1994).

When seeking summary judgment, the movant bears the initial responsibility of demonstrating the absence of an issue of material fact with respect to those issues on which the movant bears the burden of proof at trial. *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2558 (1986); *Reynolds v. Amerada Hess Corp.* 778 So.2d 759, 761 (Miss. 2000). This burden is one of production and persuasion, not of proof. *Reynolds*, 778 So.2d at 761 *citing Fruchter v. Lynch Oil Co.,* 522 So.2d 195, 198 (Miss. 1998).

However, where the non-movant bears the burden of proof at trial, the movant may merely point to an absence of evidence, thus shifting to the non-movant the burden of demonstrating by competent summary judgment proof that there is an issue of material fact warranting trial. *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2553-54. To defeat a motion for summary judgment, the nonmoving party must make a showing sufficient to establish the existence of the elements essential to his case. *Pride Oil Co.*

v. Tommy Brooks Oil Co., 761 So.2d 187, 191 (Miss. 2000). In other words, the nonmovant must present affirmative evidence that a genuine issue of material fact exists. As to issues on which the nonmovant bears the burden of proof at trial, the movant needs only to demonstrate an absence of evidence in the record to support an essential element of the movant's claim. *Crain v. Cleveland Lodge 1532, Order of Moose, Inc.*, 641 So. 2d 1186, 1188 (Miss. 1994). Only when there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party is a full trial on the merits warranted. *Lindsey v. Sears, Roebuck and Company*, 16 F.3d 616, 618 (5th Cir.1994) *citing Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

B. Premises Liability Law

The mere fact that Laura Karpinsky fell and was injured is not, in and of itself, evidence of negligence on the part of ANICO. In Mississippi, merely proving the occurrence of an accident on business premises is insufficient to prove liability; rather, the Plaintiff must demonstrate that ANICO was negligent in the maintenance of the premises. *Almond v. Flying J Gas Co.*, 957 So.2d 437, 439 (Miss.App. 2007) *citing*, *Sears, Roebuck & Co. v. Tisdale*, 185 So. 2d 916, 917 (Miss. 1966); *Robinson v. Ratliff*, 757 So.2d 1098, 1101 (Miss.App. 2000) *citing Taylor v. Biloxi Regional Medical Center*, 737 So.2d 435, 437 (Miss.App. 1999).

A plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the injury. *Herrington v. Leaf River Products, Inc., et al.*, 733 So.2d 774, 777 (Miss. 1999) *citing Burnham v. Tabb*, 508 So.2d 1072, 1074 (Miss. 1987). A mere

possibility of such causation is not enough. *Id.* A plaintiff must show that the party charged is the party actually responsible for the wrong, with reasonable certainty or definiteness. *Young v. Wendy's International, Inc.* 840 So.2d 782, 784 (Miss.App. 2003). It is not enough that this shall be left to conjecture or to inferences so indefinite that it cannot be determined where conjecture ceases and cogent inferences begin. *Id.*

The owner or occupant of business premises is not an insurer against all injuries. *Almond v. Flying J Gas Co.,* 957 So.2d 437, 439 (Miss.App. 2007)(citations omitted); *WalMart Stores, Inc. v. Littleton*, 822 So.2d 1056, 1058-59 (Miss. 2002). In order to establish a claim of negligence, it must appear that the offending defendant violated some duty to the plaintiff. *J.C. Penney Co. v. Sumrall*, 318 So.2d 829, 832 (Miss. 1975). An invitee is still required to use, in the interest of his own safety, that degree of care and prudence which a person of ordinary intelligence would exercise under the same or similar circumstances. *Vu v. Clayton*, 765 So.2d 1253, 1255 (Miss.2000); *Taylor*, 737 So.2d at 437 *citing Fulton v. Robinson Industries, Inc.*, 664 So.2d 170, 175 (Miss. 1995). An owner of business premises is not responsible for conditions which are not dangerous or where the condition is, or should be, known or obvious to the invitee. *WalMart Stores, Inc. v. Littleton,* 822 So.2d 1056, 1058-59 (Miss.App. 2002) *citing Ball v. Dominion Ins. Corp.*, 794 So.2d 271, 273 (Miss.App. 2001).

An owner, occupant, or person in charge of premises owes to a business invitee a duty to exercise reasonable or ordinary care to keep the premises in a reasonably safe condition for persons exercising reasonable care for their own safety or to warn the invitee of a dangerous condition, not readily apparent, which the owner or occupant knows of or should have known of the existence in the exercise of reasonable care.

Vu v. Clayton, 765 So.2d 1253, 1255 (Miss. 2000); *Criss v. Lipscomb Oil* Co., 990 So.2d 771, 774 (Miss.App. 2005) *citing Robinson v. Ratliff*, 757 So.2d 1098, 1101 (Miss.App. 2000). A business premises owner is not required to keep the premises absolutely safe, or in such a condition that no accident could possible happen to an invitee. *Littleton,* 822 So.2d at 1059 *citing Ball*, 794 So.2d at 273. There is no liability for harm resulting from conditions from which no unreasonable risk was to be anticipated or from those which the premises owner neither knew about nor could have discovered with reasonable care. *Evans v. United States*, 824 F.Supp. 93, 97 (S.D.Miss. 1993). There is no obligation to protect the invitee against dangers which are known to him or which are so obvious and apparent to him that he may reasonably be expected to discover them. *Criss v. Lipscomb Oil* Co., 990 So.2d 771, 773 (Miss.App. 2008) *citing Grammar v. Dollar*, 911 So.2d 619, 624 (Miss.App. 2005); *General Tire & Rubber Co. v. Darnell*, 221 So.2d 104, 107 (Miss. 1969). Against such conditions, it may normally be expected that the invitee will protect himself. *Darnell*, 221 So.2d at 107.

A plaintiff can establish that a business operator was negligent by showing that the business operator caused the dangerous condition. *Vu,* 765 So.2d at 1255; *Booth v. WalMart Stores, Inc.*, 75 F.Supp.2d 541, 544 (S.D.Miss. 1999). Where the plaintiff proves that an unsafe condition was a result of the conduct of the defendant, then the plaintiff is not obliged to additionally prove that the defendant had actual or constructive knowledge of that unsafe condition. *Dickens v. WalMart Stores, Inc.*, 841 F.Supp. 768, 771 (S.D. Miss.1994) *citing Jerry Lee's Grocery, Inc. v. Thompson*, 528 So. 2d 293, 295 (Miss. 1988); *K-Mart Corp. v/ Hardy ex rel. Hardy*, 735 So.2d 975, 981 (Miss 1999).

However, where the plaintiff is unable to show that the condition was caused by the defendant's acts or is able to show that the dangerous condition was caused by a third person not connected with the business, then, in order to prevail, the plaintiff must allege and prove by competent evidence the defendant's actual or constructive knowledge of the condition. *Dickens*, 841 F.Supp. at 771 *citing Douglas v. Great Atlantic and Pacific Tea Company*, 405 So. 2d 107, 110 (Miss. 1981); *See also, Waller v. Dixieland Food Stores, Inc.*, 492 So. 2d 283, 285 (Miss. 1986). Constructive knowledge is established by proof that the condition existed for such a length of time that, in the exercise of reasonable care, the proprietor should have known of it. *Vu,* 765 So.2d at 1255. Clearly, to avoid summary judgment, the plaintiff must show how long the unknown substance had been on the floor. Mississippi courts have consistently held that presumptions as to this time frame are not sufficient and that proof is required. "The court will not indulge presumptions for the deficiencies in plaintiff's evidence as to the length of time the hazard existed, therefore, the plaintiff must produce admissible evidence as to the time period in order to establish the operator's constructive knowledge. *Almond*, 957 So.2d at 439 *citing Waller v. Dixieland Food Stores, Inc.,* 492 So.2d 283, 286 (Miss.1986). The plaintiff must present specific proof as to the relevant actual length of time. *Id. citing Dickens v. Wal-Mart Stores,* 841 F.Supp. 768, 771 (S.D.Miss.1994).

C. Argument

To establish negligence in this case, Ms. Karpinsky bore the burden of proving 1) that some negligent act of ANICO caused a dangerous condition in the area where she fell, or 2) if a dangerous condition was caused by a third person unconnected with

the premises operation, that ANICO had (a) actual knowledge of the dangerous condition and failed to warn the Plaintiff or (b) constructive knowledge of the dangerous condition. *Robinson*, 757 So.2d at 1101; *Munford, Inc. v. Fleming*, 597 So. 2d at 1284. The Plaintiff herein cannot meet her burden of proof.

At her deposition, Ms. Karpinsky stated that she slipped on a liquid spill on the floor but really did not look at it. (R.53). She stated that she did not see a cup in the area and was not sure if there was ice in the spill when she fell. (R.53-54, 58). She could not recall if the liquid was cold or room temperature and did not know if it was water or not. (R.56, 57). Ms. Karpinsky could not recall if the liquid spill on the floor was round or square or if it covered more than one of the ceramic tiles in the floor. (R.58). She had no idea how the liquid came to be on the floor and did not see any footprints or anything through the liquid before or after she fell. (R.58). She stated there was not anyone mopping in the area at the time she fell. (R.55). She stated there was no one in the area at the time she fell. (R.56).

Ms. Karpinsky did not offer any testimony to show that the liquid on the floor was put there by ANICO employees or caused to be put there through some negligent act of ANICO. Since the Plaintiff did not offer any evidence to show that the presence of the liquid was caused by ANICO's own actions, she has failed to meet her burden of proof and must succeed, if at all, by showing constructive notice. To avoid summary judgment, the Plaintiff must produce some evidence to show how long the liquid had been on the floor.

In her deposition, eye witness Gail Clark testified that she and her husband were on the Gulf Coast on August 24, 2005, attending a conference at the Beau Rivage

Resort. (R.65). Ms. Clark and her husband arrived at the Mall on August 24, 2005, at approximately 5:00 p.m. (R.65). She testified that her husband was walking to the restroom and she walked into the Lane Bryant store. (R.66). When Mrs. Clark entered the Lane Bryant store, she did not see any water or any spill on the floor. (R.67). Mrs. Clark agreed that had there been something on the floor like a cup, water, or ice, she would have seen it when she entered the Lane Bryant store. (R.67). She entered the Lane Bryant store and was in the store "about five minutes". (R.67, 71). As she exited the store, she saw a cup and spill on the floor approximately three feet outside and just to the right of the Lane Bryant entrance. (R.67-68). Mrs. Clark recalled that there was a cup with ice still in it. (R.67, 68). As she walked out of Lane Bryant and started to walk to her right to go to JC Penney, Mrs. Clark had to walk around the spilled cup. (R.68). It was her recollection that the lady fell within ten (10) seconds of Mrs. Clark exiting Lane Bryant and just after Mrs. Clark walked around the spill. (R.68). Mrs. Clark did not see any one drop the cup or spill the water outside Lane Bryant. (R.70). She did not know how the spill came to be on the floor outside of Lane Bryant. (R.70). From the testimony of Gail Clark, it is clear that the liquid on the floor had been present LESS than five minutes before Ms. Karpinsky fell.

In *J.C. Penney v. Sumrall,* 318 So.2d 829 (Miss.1975), the plaintiff slipped and fell in the foyer of a J.C. Penney store, and the jury returned a verdict in favor of the plaintiff. The defendant appealed, and the Mississippi Supreme Court reversed and rendered judgment in favor of the defendant. *Sumrall,* 318 So.2d at 832. The evidence revealed that a customer had gotten sick and vomited in the foyer of the store. *Id.* at 830. A store employee was about fifteen feet from the foyer and witnessed the event.

Id. at 832. Rather than cleaning the vomit immediately or warning other customers of the vomit, the employee went to a telephone and called for the janitor to come clean up the vomit. *Id.* at 830. The plaintiff entered the store, slipped, and fell in the vomit as the employee was hanging up the telephone. *Id.* The plaintiff argued that the defendant was negligent in failing to immediately clean up the vomit and warn customers. *Id.* at 831. The Mississippi Supreme Court noted that the defendant was not an insurer of the safety of its business invitees and that the defendant's duty was to eradicate the known dangerous situation *within a reasonable time* or to exercise reasonable diligence in warning those who were likely to be injured because of the danger. *Id.* at 832. (Emphasis added).The Mississippi Supreme Court held that "there must be some evidence of negligence given a jury before it can determine that a defendant is guilty of negligence." *Id.* at 832. The Court continued, stating that:

> [s]ince the defendants were not insurers of the safety of business invitees who were lawfully on the store property, the duty of the defendants required them only to eradicate the known dangerous situation within a reasonable time or to exercise reasonable diligence in warning those who were likely to be injured because of the danger. In either case, ... defendants were entitled to a reasonable time in which to attempt to perform the duty imposed by law.

Id. "The mere fact that a customer succeeded in reaching the vomit and falling before the janitor, the manager and other agents ... had a reasonable opportunity to correct the situation is not sufficient evidence to establish negligence on the part of the defendants. Consequently, there is nothing for the jury to decide." *Id.*

In the instant case, it is clear that the spill on the floor of Edgewater Mall was present for "no more than five minutes" according to eye-witness Gail Clark. Based on *J.C. Penney v. Sumrall* cited herein, this is not a reasonably sufficient time to for a premises owner to eradicate the hazard or to warn of its presence. Unsupported

speculation and allegations are not sufficient to defeat a motion for summary judgment. *Adams v. Cinemark USA, Inc.*, 831 So.2d at 1161. A plaintiff must show that the party charged is the party actually responsible for the wrong, with reasonable certainty or definiteness. *Young v. Wendy's International, Inc.* 840 So.2d 782, 784 (Miss.App. 2003). It is not enough that this shall be left to conjecture or to inferences so indefinite that it cannot be determined where conjecture ceases and cogent inferences begin. *Id.* Conclusory allegations, bare assertions, and speculations do not support each element necessary to support a claim of negligence. *Mallery v. Taylor*, 805 So.2d 613, 620 (Miss.App. 2002).

Ms. Karpinsky attempts to persuade the Court that a genuine issue of material fact exits by arguing that the Incident Report completed after the incident reveals that the premises owner and the housekeeping company were on "actual notice" of the spill and thus summary judgement was inappropriate in this case. However, as Ms. Karpinsky concedes in her Brief, a premises owner still is given a reasonable time to fulfill its duty to an invitee. The Incident Report merely states "Guest Services advised prior to the alleged incident a customer had informed of a spill in front of Lane Bryant, at which time Guest Services notified housekeeping". The Incident Report does not state what time the "customer had informed' nor does the Report indicate in any manner the length of time that had elapsed before Ms. Karpinsky fell. The only reliable evidence that provides the time frame is Ms. Clark's eyewitness account as stated in her deposition that the cup and ice was present less than five minutes before Ms. Karpinsky's accident.

Ms. Karpinsky attempts to create a genuine issue of material fact through the use of the Affidavit of her prior counsel, Dempsey Levi. However, Ms. Karpinsky's reliance on the Affidavit is misplaced. The Affidavit is hearsay as it attempts to create a genuine issue of material fact by trying to contradict Mrs. Clark's sworn deposition testimony by stating what Mrs. Clark said in an alleged recorded telephone interview of some unknown date. The statement referenced by the Affidavit is not sworn, is not signed by Ms. Clark, the transcriptionist is not identified, and the purported transcript itself is not in any proper affidavit form. The Affidavit is hearsay since it is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted, all in violation of M.R.E. 801(c). *See, Washington v. Kelsey*, 990 So.2d 242, 246 (Miss.App. 2008). The alleged telephone interview was conducted out-of-court and Mr. Levi was not the declarant. While most affidavits are hearsay, they are nevertheless properly considered on summary judgment motions as long as they are based on personal knowledge and set forth facts as would be admissible in evidence. *Borne v. Dunlop Tire Corporation, Inc.*, 12 So.3d 565, 572 (Miss.App. 2009) *citing Leven s v. Campbell*, 733 So.2d 753, 758 (Miss. 1999). As the Affidavit is hearsay and is also based on a hearsay document, it would be inadmissible at trial and is incompetent summary judgment evidence that cannot be used to create a genuine issue of material fact.

The Affidavit is also improper summary judgment evidence in that it is an impeachment of a witness that cannot be used as substantive evidence. In *King v. State*, 994 So.2d 890, 898-99 (Miss.App. 2008), this Court stated:

> It is well established law in Mississippi that "unsworn prior inconsistent statements may be used for impeachment of the witness' credibility

> regarding his testimony on direct examination. *Moffett*, 456 So.2d at 719. However, "the prior inconsistent out-of-court statement made by one not a party may not be used as substantive evidence." *Id.*

At the deposition of Gail Clark, Plaintiff Laura Karpinsky did not ask Mrs. Clark even one (1) question. Mrs. Clark was not cross examined at all by the Plaintiff about her testimony on direct examination regarding the liquid on the floor. Plaintiff Laura Karpinsky thus failed to impeach her testimony regarding the length of time the liquid had been on the concourse floor and therefore waived her opportunity to use the alleged transcribed telephone interview as substantive evidence in opposition to ANICO's Motion for Summary Judgment.

V. **CONCLUSION**

Merely proving the occurrence of an accident on business premises is insufficient to prove liability and is not sufficient by itself to prove that a dangerous condition existed at the time of the accident. *Lindsey, supra; Evans, supra*. A plaintiff must demonstrate that the operator of the business was negligent. *Lindsey v. Sears, Roebuck and Company*, 16 F.3d 616, 618 (5th Cir.1994) *citing Sears, Roebuck and Company v. Tisdale*, 185 So.2d 916, 917 (Miss. 1966). Plaintiff Laura Karpinsky failed to show any negligence on the part of ANICO. Based on Ms. Karpinsky's own testimony and that of Mrs. Clark, the Plaintiff cannot show how the liquid came to be on the concourse floor. It is clear from Mrs. Clark's testimony that the liquid had been on the floor for less than five minutes at the time the Plaintiff slipped and fell. Consequently, the Plaintiff cannot meet her burden of proof and ANICO was entitled to judgment as a matter of law.

RESPECTFULLY SUBMITTED THIS, the 17th day of June, 2011.

AMERICAN NATIONAL INSURANCE COMPANY
Defendant/Appellee

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CERTIFICATE OF SERVICE

I, the undersigned counsel, do hereby certify that I have this date mailed, postage pre-paid, a true and correct copy of the foregoing document to:

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have been mailed to the Clerk)

Honorable Lawrence P. Bourgeois, Jr.
Harrison County Circuit Court Judge
Post Office Drawer 1461
Gulfport, Mississippi 39502

So certified, this the 17th day of June, 2011.

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Scott D. Smith